

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID M. LUCAS and ERIC L.
SALERNO,

Plaintiffs,

vs.

JOS. A. BANK CLOTHIERS, INC.,

Defendant.

CASE NO. 14-cv-1631-LAB (JLB)
**ORDER GRANTING IN PART
AND DENYING IN PART JOS. A.
BANK'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

David Lucas and Eric Salerno accuse Jos. A. Bank Clothiers, Inc. of holding perpetual sales—continually misrepresenting that its merchandise is being offered at a discount from an inflated "regular price," which it never offers. They claim this violates California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, *et seq.*, and Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1750, *et seq.* Jos. A. Bank has moved for judgment on the pleadings. (Docket no. 15.)

I. Factual Allegations

Jos. A. Bank is a retailer that operates a national chain of clothing stores. Lucas and Salerno purchased several suits from Jos. A. Bank, and allege that they relied on deceptive advertisements in deciding to make the purchases. For each of Lucas' purchases, he purchased one suit at a purported "regular price," and received two additional suits for "free."

1 Salerno's purchase was advertised as the "lowest price of the year"—\$197 for the first suit
2 and \$47 for the second suit. Plaintiffs contend that Jos. A. Bank misrepresents the "regular
3 prices" of its clothing, they relied on the misrepresentations when they made their purchases,
4 and, as a result, they paid more for Jos. A. Bank's products than they otherwise would have.
5 They make the following allegations about the alleged misrepresentation, reliance, and
6 inducement to purchase at an increased price:

7 *Misrepresentation*

8 Jos. A. Bank's "buy one get one [or more] free" suit offers and other similar
9 promotions require consumers to buy one "regular" price suit to get one or
more free item of Jos. A. Bank men's apparel. But the "regular" prices are a
sham.

10 [T]he referenced "regular price" is, in each instance, fabricated, inflated and not
11 representative of Jos. A. Bank's true former price, within the preceding three
12 months, for its men's suits and other apparel. To the contrary, Jos. A. Bank's
former prices are a price no consumer has actually ever paid for a Jos. A. Bank
suit not in connection with some sale or discount.

13 Jos. A. Bank artificially sets the false reference prices to deliberately create
14 false impressions among customers regarding the products' values and the
bargains that customers will receive if they purchase the products.

15 The deceptive "sales," which are supposedly based on discounts from former
16 prices, are in actuality perpetual. Jos. A. Bank suits, sportcoats, and dress
pants are on "sale" 100% of the time.

18 *Reliance*

19 [P]urchasers, including Plaintiffs, have reasonably perceived that they are
20 receiving valuable price reductions or bargains regarding their purchase of
men's suits, sportcoats, or dress pants. This perception has induced
21 reasonable purchasers, including Plaintiffs, to buy such products from Jos. A. Bank
at prices set by Jos. A. Bank and to refrain from shopping for the same
or similar products from competitors of Jos. A. Bank.

22 Plaintiff Salerno was induced by Jos. A. Bank's advertising and marketing into
23 believing that he was receiving an excellent value by purchasing two suits for
a total of \$244 that had a former or "regular price" of \$595 each. Plaintiff
24 Lucas was similarly induced to make his purchases because Jos. A. Bank's
advertising led him to believe he was getting a great bargain—three suits with
a former price of \$895 for only \$895 total in the first instance and the same in
each subsequent instance.

26 In fact, the reason both Plaintiffs entered into the transaction with Jos. A. Bank
27 was to receive high quality men's apparel at a price much lower than that
typically charged for such merchandise.

1 *Inducement to purchase at an increase price*

2 [Plaintiffs] would not have otherwise purchased these suits, or would not have
3 purchased these suits for the price [they] did, absent Jos. A. Bank's false
4 former price advertising and [were] damaged thereby.

5 These false reference prices increase the demand for the products, which also
6 increases the prices that [Jos. A. Bank] charges for the products.

7 Plaintiffs . . . did not receive products which had the value [Jos. A. Bank]
8 promised those products would have, were deprived of the benefit of their
9 bargained-for exchanges, and suffered damages in an amount to be
determined at trial.

10 Jos. A. Bank, in advertising a completely inaccurate and inflated former retail
11 price . . . intentionally misled [Plaintiffs] into . . . paying the prices set by Jos.
12 A. Bank for such items.

13 The FAC alleges four causes of action: (1) violation of the unfair prong of the UCL;
14 (2) violation of the fraudulent prong of the UCL; (3) violation of the unlawful prong of the UCL;
15 and (4) violation of the CLRA. Plaintiffs seek restitution and injunctive relief for the alleged
16 UCL violations and injunctive relief for the alleged CLRA violations. They seek to bring their
17 claims on behalf of themselves and a plaintiff class defined as

18 [a]ll persons who, while in the state of California and within four years of the
19 filing of this Complaint (the "Class Period"), purchased a suit, dress pants
20 and/or sportcoats/suit jackets from Jos. A. Bank, where the purchase price of
21 the item was for a percentage or discount off an advertised former price, or
22 where the purchase was for a suit, dress pants and/or sportcoat/suit jacket
23 based on a former price in connection with an offer of at least one other "free"
24 item of Jos. A. Bank apparel.

25 Jos. A. Bank contends that the Court should dismiss the FAC because Plaintiffs fail
26 to establish entitlement to a remedy.

27 **II. Legal Standard**

28 "After the pleadings are closed—but early enough not to delay trial—a party may
29 move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is
30 properly granted when, accepting all factual allegations in the complaint as true, there is no
31 issue of material fact in dispute, and the moving party is entitled to judgment as a matter of
32 law." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (brackets and internal
33 quotation omitted). A Rule 12(c) motion is "functionally identical" to a Rule 12(b)(6) motion.
34 U.S. ex rel. *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011).

1 Judgment on the pleadings should be entered when a complaint does not plead
2 "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v.*
3 *Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads
4 factual content that allows the court to draw the reasonable inference that the defendant is
5 liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The
6 plausibility standard is not akin to a probability requirement, but it asks for more than a sheer
7 possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). For
8 purposes of ruling on a Rule 12(c) motion, the Court "accept[s] factual allegations in the
9 complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving
10 party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).
11 Mere "conclusory allegations of law and unwarranted inferences are insufficient" to defeat
12 a motion for judgment on the pleadings. *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir.
13 2004).

14 **III. Discussion**

15 Jos. A. Bank contends that the Court should dismiss the FAC for failure to establish
16 entitlement to either remedy that is available for Plaintiffs' UCL and CLRA claims. First, Jos.
17 A. Bank argues that Plaintiffs fail to state a claim for restitution because the FAC doesn't
18 sufficiently allege that the amount Plaintiffs paid for Jos. A. Bank merchandise exceeds the
19 value of the merchandise. Second, it claims Plaintiffs lack standing to seek injunctive relief
20 because they're now aware of Jos. A. Bank's alleged pricing practices, and therefore unlikely
21 to be harmed by them in the future.

22 **A. Entitlement to Restitution**

23 Jos. A. Bank argues that Plaintiffs' request for restitution under the UCL "fails because
24 the FAC alleges no facts showing that the amount they paid [Jos. A. Bank] exceeds the
25 actual value of what they received."

26 The FAC alleges that Jos. A. Bank's misrepresentations increased demand for their
27 products, resulting in an increase in prices. It also alleges that, but for the alleged
28 misrepresentations, Plaintiffs wouldn't have purchased Jos. A. Bank's products at the prices

1 they paid. It's unclear at this point whether Plaintiffs will be able to establish any quantifiable
 2 restitutionary damages. But, accepting Plaintiffs' factual allegations as true and construing
 3 the pleadings in the light most favorable to Plaintiffs, it's plausible that the amount Plaintiffs
 4 paid Jos. A. Bank exceeds the value of the what they received. See *Ries v. Arizona*
 5 *Beverages USA LLC*, 287 F.R.D. 523, 532–33 (N.D. Cal. 2012) (denying defendants' motion
 6 for summary judgment to give plaintiffs an opportunity to support their claims for restitution
 7 with evidence); cf. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013) (explaining,
 8 in the statutory standing context, that a consumer suffers economic injury when he
 9 "purchases merchandise on the basis of false price information, and when the consumer
 10 alleges that he would not have made the purchase but for the misrepresentation"). If
 11 Plaintiffs cannot support their allegations with evidence, a different result may be necessary
 12 at the summary judgment stage.

13 **B. Article III Standing for Injunctive Relief**

14 Jos. A. Bank challenges Plaintiffs' Article III Standing to seek injunctive relief. It
 15 argues "[g]iven that plaintiffs are now aware of [Jos. A. Bank]'s alleged pricing practices, they
 16 lack standing to seek injunctive relief as they are not likely to be harmed by those practices
 17 in the future."

18 To establish standing, Plaintiffs must show (1) an injury in fact; (2) the injury is "fairly
 19 traceable" to the challenged conduct; and (3) the injury is "likely" to be "redressed by a
 20 favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (brackets
 21 omitted). "[A] plaintiff must demonstrate standing separately for each form of relief sought."
 22 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).
 23 "Past exposure to illegal conduct does not in itself show a present case or controversy
 24 regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."
 25 *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). Injury to unnamed members of the
 26 proposed class doesn't establish standing. *Table Bluff Reservation (Wiyot Tribe) v. Philip*
 27 *Morris, Inc.*, 256 F.3d 879, 884 (9th Cir. 2001).

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1 **1. Plaintiffs' Public Policy Argument**

2 Plaintiffs contend that they have standing to seek injunctive relief. They argue that,
 3 if knowledge of deceptive advertising strips a consumer of standing to seek an injunction, no
 4 plaintiff could ever have standing to seek injunctive relief. The Court finds some support for
 5 this argument. See, e.g., *Henderson v. Gruma Corp.*, 2011 WL 1362188, at *7 (C.D. Cal.
 6 Apr. 11, 2011) ("If the Court were to construe Article III standing for FAL and UCL claims as
 7 narrowly as the Defendant advocates, federal courts would be precluded from enjoining false
 8 advertising under California consumer protection laws because a plaintiff who had been
 9 injured would always be deemed to avoid the cause of the injury thereafter ('once bitten,
 10 twice shy') and would never have Article III standing.").

11 But, "[t]he assumption that if [plaintiffs] have no standing to sue, no one would have
 12 standing, is not a reason to find standing." *Valley Forge Christian Coll. v. Americans United
 13 for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) (first brackets original).
 14 Article III's mandate can't be displaced by a policy preference or the text of a statute.
 15 *Delarosa v. Boiron, Inc.*, 2012 WL 8716658, at *5 (C.D. Cal. Dec. 28, 2012) ("To the extent
 16 that Henderson and other cases purport to create a public-policy exception to the standing
 17 requirement, that exception does not square with Article III's mandate."); *Raines v. Byrd*, 521
 18 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing
 19 requirements by statutorily granting the right to sue to a plaintiff who would not otherwise
 20 have standing."). Plaintiffs chose to file their case in federal court, and are therefore bound
 21 by Article III's mandate. The Court declines to adopt Plaintiffs' public policy carve out.

22 **2. Plaintiffs' Intent to Purchase Jos. A. Bank Products in the Future**

23 Plaintiffs attempt to establish Article III Standing by alleging that they "would purchase
 24 Jos. A. Bank products in the future, if product labels and marketing promotions accurately
 25 reflect 'former' prices and discounts." Some courts would find this sufficient to establish
 26 standing, reasoning that plaintiffs who are aware of a defendant's misrepresentations can still
 27 be harmed, because they can't rely on the representations. See, e.g., *Ries*, 287 F.R.D. at
 28 533 ("Should plaintiffs encounter the denomination 'All Natural' on an AriZona beverage at

1 the grocery store today, they could not rely on that representation with any confidence. This
 2 is the harm California's consumer protection statutes are designed to redress.").

3 I decline to adopt this approach. An interest in purchasing a product in the future,
 4 without more, isn't sufficient to establish standing if the plaintiffs are not "realistically
 5 threatened by a repetition of the violation." *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir.
 6 2006) (citation and emphasis omitted). "[A] plaintiff may not manufacture standing for
 7 injunctive relief simply by expressing an intent to purchase the challenged product in the
 8 future." *Rahman v. Mott's LLP*, 2014 WL 5282106, at *6 (N.D. Cal. Oct. 15, 2014). "[M]erely
 9 feeling that one cannot trust defendant's future representations is not sufficient harm to
 10 confer standing for injunctive relief." *Id.*

11 **3. Threat to Plaintiffs of Repeated Injury**

12 Where state-created interests are at issue, federal courts look to state law to define
 13 the "injury" a plaintiff may assert to meet Article III requirements. *Beeman v. TDI Managed*
Care Servs., Inc., 449 F.3d 1035, 1039 (9th Cir. 2006) ("When the legislature is the source
 15 of the purportedly violated legal obligation, we look to the statute to define the injury."
 16 (quotation omitted)). In this case, the alleged injury is defined by the UCL and the CLRA.
 17 Under those statutes, a plaintiff must prove reliance on the misleading statements, and a
 18 resulting injury. *Rahman*, 2014 WL 5282106, at *6; see also *Kane v. Chobani, Inc.*, 973
 19 F.Supp.2d 1120, 1138 (N.D. Cal. 2014) ("Plaintiffs must allege that they relied on
 20 Defendant's alleged misrepresentations in order to demonstrate standing under [California's
 21 False Advertising Law], CLRA, and the UCL."). Thus, Plaintiffs only have standing to seek
 22 an injunction if they show there's a realistic threat that, in the future, they will rely on Jos. A.
 23 Bank's allegedly misleading pricing practices to their detriment. They have not made such
 24 a showing.

25 Plaintiffs allege that "[t]he deceptive 'sales,' which are supposedly based on discounts
 26 from former prices, are in actuality perpetual" and "Jos. A. Bank suits, sportcoats, and dress
 27 pants are on 'sale' 100% of the time." Thus, if Plaintiffs consider purchasing Jos. A. Bank
 28 suits, sportcoats, and dress pants in the future, they do so with the knowledge that the

1 "former prices" are inflated "100% of the time." They know they can always disregard Jos.
2 A. Bank's inflated "former prices," and they are left with the same information that they'd have
3 if the Court entered the requested injunction: the merchandise and the offered price.
4 Plaintiffs are able to evaluate Jos. A. Bank's suits, sportcoats, and dress pants against the
5 offered price, and a choice to purchase isn't induced by the exigency of an alleged sham
6 "sale." Thus, Plaintiffs haven't alleged an injury that's curable by an injunction.

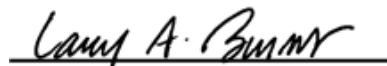
7 This doesn't mean that misled customers are deprived of the opportunity for redress.
8 Even if Plaintiffs can't allege "a real and immediate threat of repeated injury," *Lujan*, 504 U.S.
9 at 592, they remain able to seek restitution for violations of California's consumer protection
10 laws. And, "[i]f this Court lacks jurisdiction to enjoin Defendant[] or give declaratory relief,
11 consumers in Plaintiff[s'] position may yet be able to split their claim and seek injunctive relief
12 in state court." *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 951–52 (S.D. Cal.
13 2007). Several law enforcement agencies, including California county district attorneys and
14 the California Attorney General, also have the authority to bring UCL claims. Cal. Bus. &
15 Prof. Code § 17204.

16 **IV. Conclusion**

17 Jos. A. Bank's motion for judgment on the pleadings is **GRANTED IN PART AND**
18 **DENIED IN PART**. The FAC sufficiently states a claim for restitution, but doesn't establish
19 Plaintiffs' Article III Standing to seek injunctive relief. If Plaintiffs think they can successfully
20 amend their complaint, they must seek leave by *ex parte* motion no later than June 8, 2015.
21 Their proposed second amended complaint must be attached as an exhibit to the motion.
22 If they file such a motion, Jos. A. Bank shall have until June 22, 2015 to oppose it. No reply
23 should be filed unless leave is obtained in advance.

24 **IT IS SO ORDERED.**

25 DATED: May 8, 2015

26 

27 **HONORABLE LARRY ALAN BURNS**
28 United States District Judge